No. 82-1625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RALPH BOUMA and MRS. RALPH BOUMA,
Petitioner,

vs.

LARRY C. IVERSON, INC.,
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of the State of Montana

RESPONDENT'S BRIEF IN OPPOSITION

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DESIGNATION OF CORPORATE RELATIONSHIP

Respondent corporation has no parent, subsidiary, or affiliated companies. Shares of stock are owned by Farmer's State Bank of Conrad, Conrad, Montana, and United Bank of Pueblo, Pueblo, Colorado. These banks are owned respectively by The Conrad Company and United Banks of Colorado, bank holding companies.

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

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GROUNDS FOR OPPOSITION TO REVIEW ON CERTIORARI

1. This Court has no jurisdiction to examine a 1981 Montana

Supreme Court final decision governing Bouma's substantive claims on a Petition for Certiorari filed in 1983 (Section 2101, Title 28, United States Code).

2. For the same reason, this Court may not now examine the procedure involved in or leading up to the 1981 Montana Supreme Court decision (Section 2101, Title 28, United States Code).

3. The Bouma application for certiorari seeks to relitigate matters unsuccessfully presented at length in a Civil Rights action in the United States District Court for the District of Montana. He lost in both the District Court and on appeal in the Ninth Circuit; he should be held barred by the doctrine of res judicata and the doctrine of collateral estoppel.

4. Bouma's voluntary payment of the Montana Supreme Court nominal damage award for frivolous appeal has mooted the question he seeks to raise concerning the propriety of the award.

5. Bouma presents no substantial question, new to federal law, upon which this Court needs to rule.

STATEMENT OF THE CASE

Ralph Bouma is the disappointed loser in litigation under which Larry C. Iverson, Inc. recovered from Bouma a Pondera County, Montana wheat ranch of substantial value. Supported by his wife (who has no direct interest in the matters before this Court)[1] Bouma seeks certiorari to undo the results of 19 years of hard fought litigation in the Montana Court system highlighted from time to time by sidetrips into the Federal Courts.

One of these sidetrips into the Federal Court system was initiated by Mr. Bouma as a civil rights action in October 1980.

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[1] Because Mrs. Bouma has no direct interest in the void contract, the farm, or case, our further reference to "Bouma" will be to Mr. Bouma unless the text indicates otherwise.

The allegations of this Petition for Certiorari substantially rehash the allegations made in that litigation. The civil rights suit was dismissed for lack of substance by the Federal District Court and that result was affirmed by the Ninth Circuit Court of Appeals.

Though the history is extensive, convoluted and detailed the highlights might fairly be presented as follows:

Respondent Larry C. Iverson, Inc. is a Montana corporation organized to own the Iverson family Pondera County wheat ranch. The original incorporaters fell upon hard times. The stock of the corporation with one small exception in favor of an Iverson daughter is now owned by two banks which acquired stock through Sheriff's sale and by a bankruptcy trustee who acquired stock due to operation of the bankruptcy laws.

During the hard times just mentioned, the corporation came under the malevolent influence and defacto control of two self-dealing "consultants" from Phoenix, Arizona. These gentlemen, by one means or another, cashed out substantially all of the assets of the corporation and appropriated the proceeds. The farmland in dispute with Mr. Bouma is the only substantial remaining asset. This sordid story is the subject of Judge Robert S. Keller's 1971 Order reprinted in its entirety as Volume II of the Bouma Appendix.

Bouma's present position and predicament arise out of a void "sale" of the farm from the corporation (acting through the Phoenix consultants) to Mr. Bouma done in the summer of 1968 without any proper regard for the basic requirements of Montana law. The laws involved are those designed to protect corporate stockholders from corporate management and corporate mismanagement. Nevertheless, both the law and the stockholders were ignored to the ultimate benefit of Mr. Bouma and the gentlemen from Phoenix.

The two stockholder banks brought suits in the Pondera County, Montana, District Court in the late 1960's which were consolidated for trial and resulted in expulsion of the gentlemen

from Phoenix and establishment of a liquidating receivership set up by the 1971 Order by Judge Keller previously referred to.

Upon Court direction the receiver sought to recover the farm by suit against Bouma instituted in December 1971. Those proceedings are now completely terminated insofar as the Montana Court system is concerned. They resulted in recovery of the farm for the corporation as a result of summary judgment against Mr. Bouma entered in September 1979 in favor of the corporation which by that time had been substituted for the receiver as the named party Plaintiff.

The September 1979 summary judgment voided the Bouma purchase contract, ordered restoration of the farm to the corporation and required further proceedings to extract from Mr. Bouma an accounting for more than 10 years worth of crops and oil revenues. The accounting was done during 1980 and concluded in October of that year. Upon conclusion of the accounting the final District Court judgment was entered and thereupon appealed to the Montana Supreme Court by Mr. Bouma.

Mr. Bouma lost his appeal of the District Court summary judgment, the results of the accounting and, further, he lost the accounting issues raised by Iverson's cross-appeal. The case was decided by the Montana Supreme Court in November of 1981. Rehearing sought by Bouma was denied by the Montana Supreme Court January 11, 1982. This is a final decision and not subject to further appeal in the Montana Court system. No Petition for Certiorari with respect to the 1981 decision was ever filed. But see: Application for stay denied in this Court February 26, 1982, Docket No. A-745.

Because of the Bouma loss, the cross-appeal victory of Iverson, and the lapse of time required for the appellate process, a further mini-accounting was required. For that purpose *only* the Montana Supreme Court remanded to the trial court. Those proceedings were concluded by the end of February 1982. Bouma attempted a second, unsuccessful, Montana Supreme Court appeal. The appellate decision (rendered on briefs) was entered

December 2, 1982 and rehearing was denied December 16, 1982.

In the 1982 decision the Montana Supreme Court classified Mr. Bouma's efforts as frivolous and in accordance with its published court rule, *Rule 32, Montana Rules of Appellate Civil Procedure,* damages in the nominal amount of $500.00 were assessed against Bouma. This is the second such penalty. Mr. Bouma paid $1,000.00 in 1973. The taxable costs incurred and the $500.00 damage award have been voluntarily paid by Mr. Bouma. No compulsory process has issued.

Because we question the timeliness of Mr. Bouma's Petition for Certiorari we quote from the 1982 decision[2] of the Montana Supreme Court, reprinted in the Bouma papers as Appendix "D" and from that source, at Volume I, Page 104 direct the Court's attention to the following:

> ". . . Ralph Bouma, representing himself, stated, 'The real issue is yet whether or not they can take possession of my farm'. . . Mr. Bouma has failed to realize that this issue was completely and *finally* resolved in our prior [1981] decision.
>
> * * *
>
> Mr. Bouma is seeking nothing more than relitigation of issues already settled. We remind Mr. Bouma that the law cannot, and will not, be distorted to satisfy the personal whims of one man.
>
> The appeal is hereby summarily dismissed as frivolous and damages . . . are hereby assessed . . ." [emphasis by the Montana Supreme Court]

SUMMARY OF ARGUMENT

Of the six issues sought to be presented by the Bouma Petition, four were determined as matters of absolute finality in the Montana Supreme Court in its 1981 decision. (Nos. 1, 2, 4 and 5) Those issues are time-barred for consideration in the United States Supreme Court under certiorari. Mr. Bouma can neither dredge them up nor breathe life into them through an effort to

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[2] Locally printed only. *39 St.Rptr. 2125.*

connect them to the 1982 decision. Beyond that, old issues 1 & 2 have been separately and independently examined in the United States District Court for the District of Montana and the Ninth Circuit Court of Appeals in the context of a Civil Rights action brought by this same Mr. Bouma against this same Larry C. Iverson, Inc. Mr. Bouma advocated but lost those issues in those Courts; he ought not to be allowed to make the United States Supreme Court the fourth Court to consider these matters.

One of the two new issues (No. 3) deals with the qualifications of the trial court to hear the mini-accounting, a clerical matter directed by the 1981 Supreme Court remand. Mr. Bouma contends he was deprived of due process though he had a full day of hearing before the specially appointed Judge, Honorable Mark Sullivan, to make what showing he could respecting the prejudice of the Judge, Honorable Leonard Langen, about to proceed with the mini-accounting. The other new issue (No. 6) is the award of nominal damages for a frivolous appeal which has been mooted by Mr. Bouma's voluntary payment and is, in any event, a de minimus matter.

Mr. Bouma's fifth issue, because it post-dated his Civil Rights filing, was not an issue in his Civil Rights case. But the fifth question, whether or not Ralph Bouma might personally argue before the Montana Supreme Court is out of time for the same reason that everything else prior to the 1981 decision is out of time.

ARGUMENT

Counsel for Respondent appreciate the potential under *Rule 23.1, Supreme Court Rules* that this Court's first order may be a summary disposition on the merits of the case. Accordingly our argument will include matters supporting opposition to the grant of a Writ of Certiorari and arguments answering the affirmative matters relied upon by Mr. Bouma.

Grounds for Opposition One and Two
The Petition for Certiorari Is Not Timely

From 1968 to 1982 Ralph Bouma was in continuous possession of a Pondera County, Montana wheat farm claiming the right to be there and have the proceeds of the farm by virtue of a void Contract for Deed. As a result of earlier proceedings, Mr. Bouma was sued for the corporation by its receiver in an action designed to have the Bouma contract declared void. The action further sought recovery of possession and an accounting of the proceeds of the premises during the years of the Bouma occupation.

In trial court Mr. Bouma lost on September 25, 1979. The decision the trial court made that day ruled that the Bouma contract was indeed void, that the Iverson Corporation owned the farm and it was entitled to possession. The parties were ordered to account between themselves for the payments Mr. Bouma had made over the years and the proceeds Mr. Bouma had taken unto himself during that period of time. After a number of procedures toward this end the accounting was completed and decreed by the trial court in October 1980. Subject to appeal to the Montana Supreme Court the trial court aspect of this matter concluded at that time.

Bouma did appeal the trial court decision to the Montana Supreme Court. Respecting certain elements of the accounting, the Iverson Corporation filed a cross-appeal.

From the beginning of the action to recover the farm by the receiver for the Iverson Corporation, Ralph Bouma has represented himself and he has provided counsel for Mrs. Bouma. The Montana Supreme Court commented on this in *Campanella v. Bouma,* 520 P.2d 1073 at p.1075-76. The case before the Court at the time was an intermediate appeal and the Court said:

> "The Court has no real interest or right in questioning his [Bouma's] judgment or motives unless and until his conduct of his own case seriously approaches the point of hampering or impeding the administration of justice or the rights of

other parties before the Court. We are now at that point. Specific instances shall go uncited at this time, however it is apparent that in the past Mr. Bouma has used his lack of representation to his advantage in these proceedings and has also used the fact of hs wife's representation also to his advantage."

Mrs. Bouma was originally joined in the 1971 action to recover the farm to eliminate any question of a claim of dower she might have in the Iverson farm. In 1974 Montana adopted the Uniform Probate Code and repealed its dower statutes. Subsequently a motion was made by the Plaintiff to dismiss Mrs. Bouma from the litigation but because Mr. Bouma resisted this, the motion was ultimately withdrawn. The only logical reason for resisting her dismissal was to continue the arrangement of a combination pro se appearance by Mr. Bouna with the assistance of a lawyer ostensibly representing Mrs. Bouma. Mrs. Bouma has never been, and is not now, a named party to the Contract under which Bouma claims the farm.

With that background in mind the Montana Supreme Court did decline to hear Ralph Bouma personally argue his case and asked that Mr. Gale Gustafson, counsel for Mrs. Bouma over many years present the matter to the Court. Mr. Gustafson was of course present. He stepped into the breach to fulfill this function.

The ultimate result was a Montana Supreme Court decision handed down November 17, 1981 affirming the lower court's adjudication that the Bouma Contract was void, affirming the ownership of the ranch in the Iverson Corporation and affirming as to all of the accounting questions raised by Mr. Bouma. The Court granted two out of the three points respecting the accounting as raised by the Iverson Corporation on cross-appeal. Inasmuch as the accounting in trial court had gone no farther than the end of crop year 1978 and because several items had to be determined with respect to the issues upon which the Iverson Corporation prevailed on cross-appeal, the Montana Supreme Court remanded the case to the trial court for further accounting proceedings strictly in accordance with the opinion issued. That opinion is published at 639 P.2d 47 and appears as item "B" in the

Bouma Appendix, Volume I, Page 28. It is important to note that by this decision the question of who owned the farm and who is entitled to possess the farm were determined with finality within the Montana Court system.

Mr. Bouma was aware of the finality of the Montana proceedings and the time allowed for certiorari in this Court on or before February 25, 1982. He filed an application for stay before Justice Rehnquist. ("Denied, W.H.R. 2/26/82"). This application raised the matters. Bouma now seeks to litigate under his issues 1, 2 and 5 and contemplated petition for certiorari by April 11, 1982. He did not file. He knowingly let his time go. See this Court's Docket No. A-745.

Mr. Bouma did continue his fight in the Montana Court system. He had previously exhausted his peremptory challenges to presiding Judges under the Montana Fair Trial laws. Accordingly Mr. Bouma undertook an attempt to show actual bias and prejudice on the part of the sitting trial Judge, Honorable Leonard Langen of Glasgow, Montana. Mr. Bouma filed the necessary papers to this end and by Supreme Court appointment his papers and his proof were brought for hearing before a Judge from Butte, Montana specially appointed for the purpose.

The Judge from Butte, Honorable Mark Sullivan, entertained all of the evidence Mr. Bouma wanted to present, but ruled that it failed to establish bias or prejudice on the part of Judge Langen. Mr. Bouma thus failed in his effort to disqualify Judge Langen.

A few days later Judge Langen sat on the mini-accounting and by scrupulously following the mandate of the Montana Supreme Court rendered a final monetary judgment between the parties which updated the accounting in all respects and allowed for those items ordered in favor of the Iverson Corporation by the Supreme Court. The actual numbers of dollars were stipulated. An orderly, peaceful transition of possession was prescribed and a time for disbursement of monies was appointed. These things have been done.

Mr. Bouma again appealed to the Montana Supreme Court and again attempted to raise the issue of hs right to ownership and possession of the farm. He claimed no error in the mini-accounting. The Montana Supreme Court pointed out that the lower court, Judge Langen, had little more than a clerical function to perform and had done just that making ". . . no substantive or procedural decisions . . " What Judge Langen did was "Acting under this Court's specific instructions, Judge Langen modified the accounting decree." The Court went on to point out to Mr. Bouma what should have been obvious: That the 1981 decision had completely and finally resolved the issues he sought to press and press again. These are the same substantive issues he now seeks to bring before this United States Supreme Court though they are now two years gone.

On this basis we are satisfied that with the exception of questions numbered 3 and 6 in Bouma's list of questions for review, all of Mr. Bouma's questions are time barred under 28 United States Code 2101(c). That statute allows 90 days for a Petition for Certiorari and is, on its face, jurisdictional. This Court has so held in the past. See *F.T.C. v. Minneapolis Honeywell Reg. Co.,* 344 U.S. 206 (1952) and *Department of Banking v. Pink,* 317 U.S. 264 (1942).

Mr. Bouma lost the farm by summary judgment in 1979 and this was affirmed by the Montana Supreme Court in 1981; if Mr. Bouma had any federal questions to raise in aid of reclaiming the farm he should have applied for certiorari two years ago. He did not do so. Accordingly this Court is without jurisdiction to afford Mr. Bouma the primary relief he seeks as to all substantive matters as well as most procedural matters.

Grounds for Opposition Number Three—
Res Judicata and Collateral Estoppel

Ralph Bouma and his wife brought a Civil Rights suit in the United States District Court against Larry C. Iverson, Inc., and others including the counsel undersigned and various of the trial Judges involved in this case from time to time. See Respondent's Appendix "A". The suit was filed and an application for temporary restraining order argued, on the same day, October 6, 1980. The date is significant because October 7, the following day, was the day set by the presiding trial Judge Langen in State Court upon which the accounting matters would first be finalized. The temporary restraining order was sought to block the matters in State Court. It was denied by United States District Judge Battin and the State matters were completed on schedule.

Thereafter motions to dismiss were made and briefed. Argument was conducted in the United States District Courtroom at Billings, Montana. The result was a dismissal with prejudice by the District Court, later affirmed by the Ninth Circuit Court of Appeals in an unpublished memorandum in its Docket 81-3331 filed June 21, 1982. See Respondent's Appendix "B".

Relying on the opinion of the United States Supreme Court in *Patterson v. Colorado, ex rel Attorney General,* 205 U.S. 454, 461 (1907) the Ninth Circuit specifically addressed the matters urged by Mr. Bouma under this present questions for review one and two. The language of the Court reads:

> "The Boumas contend the State Courts deprived them of due process: (1) by construing the Montana Corporate Code to require nullification of contracts entered into without strict compliance with that Code; and (2) by giving collateral estoppel effect to findings of fact and conclusions of law of former judgments to which the Boumas were allegedly strangers. These arguments are without merit. The assertion that a State Court decision is incorrect and contrary to prior State Court decisions does not present a question for Federal review. The District Court properly concluded that no Fourteenth Amendment violations had been presented."

Rather than detailing the allegations made by Mr. Bouma which closely parallel assertions found from place to place in the Petition for Certiorari, the Ninth Circuit summarized the entire matter saying:

> ". . . mere conclusory allegations without reference to material facts are insufficient to state a claim under the Civil Rights Act. [citations omitted] We have reviewed the record and we agree with the District Court that the Boumas have stated only conclusory allegations of Civil Rights violations without reference to material facts. The motion to dismiss was properly granted."

Ralph Bouma's civil rights complaint runs to 71 pages and almost literally contains everything but the kitchen sink. It covers the present contentions of "bound by a prior Court decision"; "fraud on the Court"; "unforseen changes" in State Court civil procedures. It alleged the entire matter to be a massive conspiracy among the bench and bar.

Grounds for Opposition Number Four—
Voluntary Payment of the Supreme Court Damage Award
Moots the Question Raised in that Connection

Rule 32, Montana Rules of Appellate Civil Procedure has for many years provided for "Damages for appeal without merit." The rule has been unchanged since January 1, 1966 and since that date Ralph Bouma has been in and out of the Montana Supreme Court on numerous occasions. A similar fine was levied in 1973, *Farmer's State Bank v. Iverson,* 509 P.2d 839 (1973). He cannot fairly deny an opportunity for notice. With respect to the $500.00 nominal damage award Mr. Bouma has applied to both Supreme Courts, Montana and United States, for a stay. He has been refused on each application. No compulsory process was ever issued to compel payment. Nevertheless, Mr Bouma finally did pay the damage awards and the taxable costs assessed.

Our research would indicate that neither this Court nor any appellate Court at any level will ordinarily entertain moot questions in the absence of some compelling public reason to express an opinion. This Court will dismiss on the grounds that

the issues are moot. There is no longer a "case or controversy" under Article III of the Constitution. *Priser, Comm. v. Newkick,* 422 U.S. 395 (1975). In acquiescing by payment, Mr. Bouma has waived his right to bother this Court with an essentially de minimus point.

Response to Mr. Bouma's Petition

— and —

Grounds for Opposition Number Five—
Lack of Important Federal Question

As this Court's Rule 17 points out ". . . certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." The questions raised must be federal in nature, important in their consequences, and special matters to which this Court should speak. Such circumstances are simply absent from the Bouma presentation.

The jurisdiction under certiorari empowering this Court to review the actions of State Court systems arises out of the grant in 28 U.S. Code 1257(3). Reading of that section would indicate that the only toe-hold the statute grants to Mr. Boumas arises out of the phrase ". . . title, right, privilege or immunity especially set up or claimed under the constitution . . . [of] the United States." Mr. Bouma simply concludes and then asserts (rather than demonstrating) that "due process" has been violated in a number of ways. Those assertions can be examined by tracking Bouma's citations to Rule 17.1 of the Revised Rules of this Court. The citatons appear at Pages 27, 40, 42, 46, 47, and 50 of the Bouma Petition.

At Page 27 Bouma refers to Rule 17.1(c) in connection with his contention that though he was not a party he was bound by a fraudulently obtained decision in a prior action. In his Civil Rights action he made this contention before the United State District Court and in the Ninth Circuit. Both Courts expressly

considered the point and expressly disallowed it because indeed Mr. Bouma was not held bound by any prior decisions in which he had any legitimate interest.

At Page 40 of his Petition Mr. Bouma cites and relies upon Rule 17.1(c) of this Court's Rules in connection with his contention that his right to due process was violated by virtue of the failure to disqualify Judge Langen. He is the trial Judge who had previously ruled adverse to Mr. Bouma on the summary judgment and had made accounting decisions with which Mr. Bouma disagreed. The decisions with which Mr. Bouma disagreed were put to rest by the 1981 Montana Supreme Court opinion. The disqualification motion came when the matter was remanded for the mini-accounting to update and modify the decree in accord with the Supreme Court decision.

It is apparent from the Montana Supreme Court's 1982 opinion that Mr. Bouma's matter was indeed duly processed. He had his "day in Court" and appellate review. A special Judge was appointed to hear his evidence of actual bias and prejudice. A transcript was prepared concerning that hearing which was reviewed by the Montana Supreme Court at Mr. Bouma's instance. In this connection the Montana Court said, quoting from Volume I, Page 103-104 of the Bouma Appendix:

> "After Judge Langen set the date for a hearing to modify the accounting decree, Appellants filed an affidavit to disqualify Judge Langen. . . . [this Court] ordered Honorable Mark Sullivan to conduct disqualification proceedings. Judge Sullivan found no showing of prejudice or bias on the part of Judge Langen. . . .
>
> * * *
>
> The transcript of the disqualification proceedings shows the real purpose underlying Mr. Bouma's attempts to postpone the resolution of this case. In final statements before Judge Sullivan, Ralph Bouma, representing himself, stated 'The real issue is yet whether they can take possession of my farm.' (Transcript of hearing before Judge Sullivan, February 23, 1982, pg. 150)."

At Page 42 of his Petition Bouma again invokes Rule 17.1(c) of the Rules of this Court. He does so in the context of accusing the Montana Supreme Court of being "so enmeshed" that it could not render an unbiased decision. On the preceding page Mr. Bouma had said in reference to the Montana Supreme Court that ". . . five of the seven justices were named in a Civil Rights action by the buyers . . . also they were named as possible defendants in an affidavit requesting the empaneling of a grand jury." Contrary to the extreme facts in *Johnson v. Mississippi,* 403 U.S. 212, (1971) neither the Montana Supreme Court nor any of its justices were named as defendants in Mr. Bouma's Civil Rights suit. Bouma's reliance on the case is misplaced and misguided.

When Bouma prepared his grand jury affidavit, he did so on the caption of, and the docket number of, the Civil case before Judge Langen. Bouma Petition, p.41. He, the Judge, was presiding as a replacement for the local judge, Honorable R. D. McPhillips who had been disqualified by Bouma years before.

The effect of the affidavit was to ask Judge Langen to call a grand jury to investigate Bouma's enemies. It was denied as to this relief and then filed by the Clerk in the Civil suit by order of the Judge. Bouma's effort is not consistent with Montana practice as a whole. We rarely mix civil and criminal matters. Replacement Judges do not usually call grand juries in the territory of others.

Both the Civil Rights complaint and the affidavit seeking the grand jury were voluntary acts taken by Mr. Bouma exercising his judgment as attorney pro se. It is abhorent to our concepts of law that a party such as Mr. Bouma can voluntarily and under the cloak of privilege, defame the Courts in which he chooses to litigate with the intention of later seeking to employ this as a basis of disqualification. Cases so holding include *United States v. Corrigan,* 401 F.Supp. 795, 798 (citing unpublished *Bonner v. Circuit Court of City of St. Louis,* Docket 74-811, Eastern District Missouri); *Smith v. Smith,* 564, P.2d 1266, citing *Ponder v. Davis,* 233 N.C. 699, 65 S.E.2d 356 and *In Re: Union Leader Corporation,* 292 F.2d 381, and *Commonwealth v. Murphy,* 295 Kentucky 466. The general tenor of the citations is to the effect

that a party such as Mr. Bouma may not interrupt the orderly flow of the judicial process by ersatz actions such as his attempt at prosecution of so called Civil Rights claims or name calling in a "grand jury affidavit."

Mr. Bouma next relies on Rule 17 of this Court at Pages 45 and 46 where in substance he claims a denial of due process because the Montana Supreme Court did not allow him the privilege of personal oral argument in respect to the 1981 appeal. The 1981 appeal of course is beyond the reach of review by certiorari as time barred. Were it not so barred this Court would be ill-advised to undertake to expand the *Faretta* rule beyond its constitutional law/criminal law context. *Faretta v. California,* 42 U.S. 806 (1974).

As *Faretta* makes very clear, the right of a party to appear pro se is federal and constitutional only in the context of state criminal law. See the opinion, 422 U.S. 806 at 831.

In the civil context, and applicable only to Federal Courts, the privilege of self representation is extended by 28 U.S.C. §1654. The further citations advanced by Mr. Bouma in support of his major premise, appearing at Page 43 of his Petition, simply do not support his contention. He has no right, constitutional or otherwise, to insist upon self representation to the point of being allowed to personally present oral argument in the Montana Supreme Court. Not even a prisoner has a right to personally appear to argue at the appellate level. *Price v. Johnston* 334 U.S. 266, 285 (1948).

Mr. Kramer of *Kramer v. Scientific Control Corporation,* 534 class F.2d 1085 was an attorney and the leading member of a class in an action represented by his law partners. The considerations were altogether different from those presented in this case. Mr. Garrison in *Garrison v. Lacey,* 362 F.2d 798 was a Federal prisoner who chose to be his own lawyer and apparently lived to regret it. Miller in *Miller v. McCarthy,* 607 F.2d 854 was a California prisoner who litigated ineffective assistance of counsel after hiring a lawyer to take an appeal. The complaint was that the

lawyer failed to take action or tell Miller how he could do the appeal himself.

All in all, it is obvious that Mr. Bouma has mis-stated the authority upon which he relies and indeed there seems to be no authority which does support his contention. Several state appellate courts have concluded that there is no constitutional right to oral argument. See *Sabatinelli v. Travelers Insurance Company*, 341 N.E.2d 880, at 882-883 (Mass. 1975); *Golden Gate Lumber Co. v. Sharbacher*, 39 P. 635, at 636 (Calif. 1894). *Montana Rules of Appellate Civil Procedure 29(b)* provides for regulation of argument to ensure that it serves the intended purpose of assisting the Court.

The attorney who did argue the case to the Montana Supreme Court in connection with the 1981 appeal, Gale Gustafson of Conrad, Montana, is the attorney who had for years "represented Mrs. Bouma" in connection with all of these proceedings. His experience in working as "co-counsel" with Ralph Bouma covered the better part of 10 years and he had participated in all of the proceedings which were within the scope of the appeal. A suggestion that Mr. Gustafson had inadequate preparation time is simply not candid; he came prepared to argue for Mrs. Bouma. "Her" position never varies from that of Mr. Bouma.

It is nowhere suggested that Mr. Gustafson's argument was in any respect incompetent or that Mr. Bouma suffered any prejudice in this respect. Mr. Bouma indicates nothing that Mr. Gustafson failed to present or presented but should have omitted. Bouma suggests nothing that might have been better presented had he personally addressed the Court. His objection is waived.

Mr. Bouma's last citation in reliance upon Rule 17.1(c) appears at Page 50 where he asserts that he has been deprived of property ($500.00) without due process of law by being assessed for a frivolous appeal. Notice to Mr. Bouma appears in the rules of the Montana Supreme Court at *Rule 32, Montana Rules of Appellate Civil Procedure.* Mr. Bouma must have been aware of this

possibility. The same rule was invoked against him by the Montana Supreme Court in connection with the appeal of *Farmers State Bank of Conrad v. Iverson, et al.*, 509 P.2d 839 (1973). See, Bouma Appendix, Volume I, p.54. He also paid that $1,000.00 penalty voluntarily, without execution.

In connection with this argument Mr. Bouma makes the incredible statement that "If the buyers [Bouma] had been given a chance they would have shown the second appeal was not frivolous. They could have shown that the decision on the first appeal was not final under Title 28 U.S.C. §1257." Petition, p.49. Absolutely no one reading the 1981 Montana Supreme Court decision could possibly believe it was less than final except for the limited accounting issues specifically remanded to be done in the format of the mini-accounting.

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (*Wick v. Superior Court*, 278 U.S. 575; *Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Comm'n*, post, p. 588), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court (see *Gorman v. Washington University*, 316 U.S. 98). Where the order or judgment is final in this sense, the time for applying to this court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."
>
> *Department of Banking v. Pink*, 317 U.S. 264 (1942).

Although the decision on the first appeal modified the judgment in part, it was not modified in any way affecting the so-called federal questions Bouma seeks to raise. See *Cox Broadcasting Corporation v. Cullen*, 420 U.S. 469 (1975). The assignment on remand was essentially ministerial so the remand does not stay the time within which certiorari must be petitioned. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Bouma miscites *Davis v. Crouch*, (1876) 94 U.S. 514, which

dealt with the effect of a remand to determine liability. This Court said: ". . . In short, the judgment is one of reversal only, which . . . is not a final judgment in the suit." Opinion of the Court, p.516. The situation is not comparable to the action of the Montana Court. Bouma's central legal rights were not disturbed or revised in any substantial way on remand for mini-accounting. See *33A Am.Jur.2d, Federal Practice and Procedure* §760.

CONCLUSION

The Montana Supreme Court, by its decision of November 17, 1981 with rehearing denied January 11, 1982, decided finally that the District Court correctly determined Ralph Bouma's so-called purchase contract was void, that Mr. Bouma and the Corporation had a reciprocal duty to account each to the other and that, with minor exceptions, the accounting was properly done. Concurrently that Court decided that the matters Mr. Bouma now seeks to raise concerning (1) being bound by a prior State Court decision to which they were not parties; (2) matters of refusal of defenses of ratification and estoppel; (3) right to oral argument on appeal had no merit.

Implicit in the 1981 decision is the determination that it was within the right of the Montana Supreme Court to regulate oral argument before itself and require that Ralph Bouma be represented for that occasion by his wife's attorney of some ten years experience in the matter. The Montana Supreme Court has expressly determined that its decisions to that point were final as to Ralph Bouma and would not be the subject of further review or consideration in the Montana Court system. Bouma knew matters in the Montana Courts were "final" when he applied to this Court in February, 1982. See his application in this Court's Docket No. A-745, at Page 6, line 10.

Since then, in its 1982 decision, the Montana Supreme Court has approved the refusal to disqualify the trial Judge for actual bias after an extended hearing was provided and it has assessed Ralph Bouma $500.00 in damages for a frivolous appeal under its *Rule 32, Montana Rules of Appellate Civil Procedure.*

If any legitimate federal issues lurk in Mr. Bouma's questions for review they were decided adversely to him in 1981 except for his issues 3 and 6. Issues 3 and 6 arise out of proceedings on remand final in 1982. They are undoubtedly timely for this Court's consideration. However, there is no violation of due process in the disqualification proceedings relating to Judge Langen. A complete hearing was had and a transcript prepared. The transcript was reviewed by the Montana Supreme Court which affirmed. Mr. Bouma had his day in Court both at the District Court level and at the Supreme Court level but he failed to prevail. That does not represent a deprivation of due process of law.

As to fining Mr. Bouma $500.00 without notice or opportunity to be heard it may be suggested that this is the second fine Mr. Bouma has incurred and paid in 10 years under Rule 32 of the Montana Appellate Procedures. His plea of ignorance is unacceptable.

Petitioners have raised no substantial federal issues, and no federal issues have been timely raised. The petition comprises a massive collection of conclusions unsupported by fact.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION
CV-80-117-GF
MEMORANDUM OPINION[1]

RALPH BOUMA, and MRS. RALPH BOUMA, his wife,

Plaintiffs,

—vs—

LARRY C. IVERSON, INC., a Montana corporation; GEORGE CAMPANELLA, individually, and as Receiver for Larry C. Iverson, Inc.; UNITED BANK OF PUEBLO, a Colorado Banking corporation; CRESAP S. McCRACKEN, individually, and as counsel for United Bank of Pueblo, Larry C. Iverson, Inc., as partially reconstituted, and George Campanella, as Receiver for Larry C. Iverson, Inc.; HENRY WILLIAMS, individually, and as former President of the United Bank of Pueblo; FARMERS STATE BANK OF CONRAD, a Montana Banking corporation; CARL POHLAD, individually, and as controlling interest-holder of Farmers State Bank of Conrad; EARL M. BERTHELSON, individually, and as former President and current Director of Farmers State Bank of Conrad; RAY F. KOBY, individually, and as counsel for Farmers State Bank of Conrad and Larry C. Iverson, Inc. as partially reconstituted and George Campanella, as Receiver for Larry C. Iverson, Inc.; THE UNITED STATES DEPARTMENT OF JUSTICE; BENJAMIN R. CIVILETTI, individually, and as United States Attorney General; JO ANN HARRIS, individually, and as Chief of the Fraud Section, Criminal Division, United States Department of Justice; COUNTY OF PONDERA, a body politic of the State of Montana; DOUGLAS ANDERSON, individually, and as Pondera County Attorney; EVERETT ELLIOTT, individually, and as Chairman of the Board of Pondera County Commissioners; THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA,

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[1] filed by clerk of court April 24, 1981

IN AND FOR THE COUNTY OF PONDERA: BERNARD W. THOMAS, as Presiding District Court Judge in Pondera County Causes No. 8221 and 8703 as consolidated; LEONARD H. LANGEN, as Presiding District Court Judge in Pondera County Cause No. 8509,

Defendants

This is a case in which the plaintiff alleges civil rights violations occuring over the course of over a decade of state court litigation. For the reasons given below, we have determined that all of the named defendants' motions to dismiss should be granted and that all motions for summary judgment should be denied.

I. FACTUAL BACKGROUND

The facts of this case are lengthy and intricate, involving over twelve years of state court litigation and numerous county, state, and federal officials. The original problems arose affter Ralph Bouma, plaintiff in this federal action, entered into a land exchange transaction with Larry C. Iverson, Inc., a Montana corporation which was than having severe financial difficulties. Under the terms of the agreement, Bouma exchanged his cattle ranch for cropland owned by Larry C. Iverson, Inc. The ranch which Larry C. Iverson, Inc. acquired from Bouma was immediately sold at a public auction to Bouma's brother. At the time of the land exchange transaction, claims of numerous creditors were pending against Larry C. Iverson, Inc.; the ensuing nine years of litigation represent the struggles of two of these creditors, Farmers State Bank and United Bank of Pueblo, to rescind the transaction with Bouma as fraudulent.

In November 1970, defendant United Bank of Pueblo filed suit in Montana District Court of the Ninth Judicial District of Pondera County, seeking appointment of a receiver for Larry C. Iverson, Inc. and also the rescission of the 1968 land exchange contract. A similar suit by defendant Farmers State Bank was subsequently consolidated with this case. Bouma alleges that he was denied permission to intervene in this action, although there

is no record that a motion to intervene was ever filed. Bouma further alleges that the two banks, their officers, state court Judge Keller, and the banks' attorneys were involved in an elaborate mail fraud scheme to seize the stock of Larry C. Iverson, Inc.; the specifics of this scheme are outlined in a proposed "draft indictment" of the United States Attorney's office, an indictment which was later dismissed in federal court. On April 7, 1971, the state district court issued findings that George Campanella, also a named defendant here, should be appointed as a permanent receiver; that John C. Treadaway and J. Milton Krull, the officers of Larry Iverson, Inc. with whom Bouma negotiated the 1968 contract, should be removed from the board of directors; and that Treadaway and Krull had no financial interest in the 1968 contract.

Bouma alleges that this receivership action violated his due process rights by adjudicating his rights on the 1968 contract without his presence. But, according to the record, no such issues were ever decided, although the parties raised them in certain filed documents. Instead, on December 10, 1977, receiver Campanella filed a new action, Pondera County Cause No. 8509, against Bouma to rescind the 1969 contract. On March 24, 1978, the reconstituted Larry C. Iverson, Inc. was substituted for Campanella as plaintiff. Finally, on November 30, 1979, Judge Leonard H. Langen (the fourth state judge to sit on the litigation in Pondera County Cause No. 8509) granted Larry C. Iverson, Inc.'s motion for summary judgment, holding that the 1968 contract was void as an *ultra vires* act on the part of Krull and Treadaway and that Bouma knew or should have known of Krull and Treadaway's lack of authority.

Then, on October 6, 1980, plaintiff Bouma brought his plight before this Court, alleging that Campanella, the banks, two of the state court judges, county officials, federal officials, and several attorneys were all conspiring to violate his civil rights in contravention of 42. U.S.C. §§ 1983 and 1985 (1976). Specifically, Count I of Bouma's complaint alleges violations of 42 U.S.C §§ 1983 and 1985 (1976) by the judges and participants in the state court litigation; Count II alleges jurisdictional defects in the state court decision which require that a temporary restraining order

issue; Count III alleges violations of 42 U.S.C. § 1986 by the United State Department of Justice for failure to protect Bouma from civil rights violations; Count IV alleges violations of 42 U.S.C. § 1986 by Pondera County officials for failure to protect Bouma from civil rights violations. On October 8, 1980, this Court denied Bouma's request in Count II for a temporary restraining order staying the state court proceedings. Now we are called upon to rule upon the motions to dismiss all four counts which have been filed on behalf of the eighteen named defendants.

II. COUNT I
A. § 1983 Claims

Under Count I of his complaint, Bouma alleges the state court litigation has violated the following of his constitutional rights: "right to be free from conspiracy and bad faith prosecution, right to a fair and impartial trial, right to due process and equal protection of the law, and deprivation of valuable property rights." Complaint at pp. 16-17. The "right to be free from conspiracy" will be discussed below in our consideration of Bouma's § 1985 claims. We will deal with each of the other alleged civil rights violations giving rise to a cause of action under 42 U.S.C. § 1983 (1976) in turn.

First, we do not believe any of the facts alleged by Bouma in his complaint establish a denial of Bouma's "right to a fair and impartial trial" protected by the Fourteenth Amendment. As to the original receivership action, Bouma has not alleged that any of his property rights were adjudicated. As to Pondera County Cause No. 8509, initiated by the receiver against Bouma to rescind the 1968 land exchange agreement, there are no facts alleged which would establish that "fundamental fairness" had been violated. As other courts have noted, a party is "entitled to a fair trial but not to a perfect one." *Frayer v. Turner*, 296 F. Supp. 1256, 1257-58 (D. Wash. 1969), *aff'd*, 413 F.2d 546 (9th Cir. 1969); *Opie v. Meacham*, 293 F. Supp. 647 (D. Wyo. 1968), *aff'd*, 419 F.2d 465 (10th Cir. 1969), *cert. denied*, 399 U.S. 927. Admittedly, the complaint pleads that the lower court trial in Cause No. 8509 was riddled with errors:

1) A prejudical refusal to allow Bouma to intervene in the receivership action (Pondera County Cause N. 8221 and 8073);

2) An illegal reconstitution of Larry Iverson, Inc. to replace the receiver as plaintiff in Pondera County Cause No. 8509;

3) A refusal to impanel a grand jury to investigate the illegal acts of the banks;

4) An inadequate property valuation in Pondera County Cause No. 8509; and

5) A failure to properly reconstruct the transcript of a hearing in Pondera County Cause No. 8509 for which the court reporter's notes were stolen.

None of these facts, even when considered together, amount to prejudice so pervasive that Bouma's right to a fair trial has been affected. The alleged errors are all legal defects which can be adequately remedied on appeal.

Next, we will consider the alleged violations of due process. Many of these allegations go to the receivership action commenced by the banks (Pondera County Causes No. 8221 and 8073), but since this action adjudicated none of Bouma's disputed property rights he has failed to show a personal deprivation of a right secured by the Constitution. *Lopez v. Luginbill,* 483 F.2d 486, 488 (10th Cir. 1973), *cert. denied,* 415 U.S. 927 (1974). Instead, we turn to the due process violations alleged in the action by the receiver against Bouma to rescind the 1968 contract (Pondera County Cause No. 8509). Here, all of the due process violations may be summed up as conspiracy to commit legal errors which ultimately resulted in a decision unfavorable to Bouma. We do not find that these errors violate due process.

As stated by the United States Supreme Court, the fundamental requisite of due process is the opportunity to be heard prior to deprivation of a significant property interest. *Memphis Light, Gas and Water Division v. Graft,* 436 U.S. 1, 16 (1978). Even accepting Bouma's allegations of judicial error and conspiracy, we fail to see how his opportunity to be heard has been abrogated.

A federal court cannot find a due process violation by a state court for deciding a legal issue improperly. *Patterson v. Colorado ex rel. Attorney-General,* 205 U.S. 454, 461 (1907). As a federal court in the District of Virginia noted in considering a complaint with many of the same defects as Bouma's:

> The due process clause does not guarantee that every decision reached will be factual or just; it only guarantees that the decision will be reached by processes which are fair. Thus, insofar as petitioner alleges an error in outcome, rather than in process, his petition must fail.

United States v. Wallace, 448 F. Supp. 164, 166 (D. Va. 1978). None of the facts alleged in Count I of Bouma's complaint establish a denial of Bouma's right to be heard. For this reason, we do not believe Count I adequately states a due process violation and hence the motions to dismiss Bouma's § 1983 claim must be granted.

Several of the Count I defendants seek dismissal of Bouma's § 1983 claim on the grounds of immunity, since they are alleged to have conspired with judges who are immune from suit. Clearly, a judge enjoys absolute immunity from suit under § 1983 while acting within the scope of his judicial duties. *Pierson v. Ray,* 386 U.S. 547 (1967). Although Bouma insists there can be no judicial immunity because the judges here acted outside the scope of their duties, the acts alleged consist of judicial errors which were within the scope of the judges' duties.

The remainder of the Count I defendants argue that because one of their alleged co-conspirators is immune from suit they themselves must be similarly immune under *Haldane v. Chagnon,* 345 F.2d 601 (9th Cir. 1965). However, the recent United States Supreme Court opinion of *Dennis v. Sparks,* 101 S.Ct. 183 (1980), seems to have overruled *Haldane,* stating that "private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions" and hence may not plead judicial immunity. *Id.* at 186. Based on *Sparks,* then, we must recognize judicial immunity as protecting the judges alone and not their co-conspirators.

The only exception to *Sparks* would be the receiver Campanella. A court-appointed receiver is a "quasi-judicial official" who is immune while acting "in obedience to lawful process of any sort." *Bradford Audio Corp. v. Pious,* 392 F.2d 67, 73 (2d Cir. 1968). Thus, even if Bouma could establish a § 1983 violation, receiver Campanella could plead immunity since any of acts of conspiracy he committed were done subject to a judge's approval.

Several of the defendants also plead an absence of *in personam* jurisdiction under the Montana Long-Arm Statute, Mont. R. Civ. P. 4B, involving (a) "the transaction of business within this state" or (c) "the ownership, use or possession of any property, or of any interest therein, situated within this state." United Bank of Pueblo, Henry Williams, and Carl Pohlad all claim to be beyond this Court's jurisdiction. Here the principal test, announced by the United States Supreme Court in *International Shoe v. Washington,* 326 U.S. 310 (1945), is whether a corporation receives such benefits as a result of the privileges of conducting business within a state to establish "minimum contacts" so that it may, in fairness, be called to respond to a suit in that state. *Id.* at 319. *See Bullard v. Rhodes Pharmaceutical Co.,* 263 F. Supp. 79, 81-82 (D. Mont. 1967). Here the only contact of the United Bank of Pueblo is its involvement in a suit in Montana district court. The authority seems clear that state court litigation in pursuit of out-of-state obligations cannot subject a corporation to local jurisdiction. *Dragor Shipping Corp. v. Union Tank Car Co.,* 361 F.2d 43, 49 n. 12 (9th Cir. 1966). Neither does United Bank's ownership of stock in Larry C. Iverson, Inc., a Montana corporation, support a claim of jurisdiction. *Shaffer v. Heitner,* 433 U.S. 186, 213 (1977). Likewise, defendant Carl Pohlad's ownership of stock in Conrad Co., which in turn owns stock in defendant Farmers State Bank, a Montana banking corporation, cannot subject Pohlad to this Court's jurisdiction. Still less can such allegations establish jurisdiction over Henry Williams, the inactive president of United Bank of Pueblo, who apparently does not even own stock in a Montana corporation and never personally subjected himself to this Court's jurisdiction.

Therefore, based on the fact that we believe no actionable civil

rights violations have been alleged, the defendants' motions to dismiss Count I must be granted.

B. § 1985 § 1986

Under 42 U.S.C. § 1985(3) (1976), if two or more persons conspire to deprive another of "equal protection of the laws" or of "equal privileges and immunities under the laws," these persons are subject to suit in federal court for damages under the jurisdictional statute of 42 U.S.C § 1988 (1976). To establish a cause of action under § 1985, a complaint must allege "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971). This the Bouma complaint does not do. Therefore, under the authority of such Ninth Circuit cases as *Arnold v. Tiffany,* 487 F.2d 216, 218 (9th Cir. 1973), holding that the acts complained of must be a product of class-based discrimination, we believe the Count I defendants' motions to dismiss the § 1985 claims must also be granted.

In a last effort to preserve a valid § 1985 claim, Bouma argues that he is the member of a family and a political group which is being discriminated against. In support of this motion, he cites *Azar v. Conley,* 456 F.2d 1382 (6th Cir. 1972) and Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973). We believe both of these cases involved special instances of discrimination which do not appear in the facts alleged by Bouma. In *Azar,* eight family members brought suit against certain city officials for harrassment. None of the facts before us even hint that the civil rights violations here were caused by animus toward the Bouma family. Similarly, none of the facts of the Bouma complaint suggest the same brand of political discrimination which the Sixth Circuit found in *Cameron.*

Dismissing the claims under 42 U.S.C. § 1985(3) also disposes of Bouma's claims under 42 U.S.C. § 1986. The provisions of § 1986 give a cause of action against any person who, having power to prevent a § 1985 violation, fails to do so. Clearly, to establish a valid § 1986 claim Bouma must first establish a valid § 1985

claim. *Hahn v. Sargent*, 523 F.2d 461, 470 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). Having failed to adequately allege a § 1985 violation, Bouma has also failed to allege a § 1986 violation.

III. COUNT II

Since we have already denied the temporary restraining order requested in Count II by our Order of October 8, 1980, we need not dwell for long upon this count. The only other relief requested in this count is a declaration that the Orders of November 30, 1979, and September 9, 1980, by the Montana District Court in Pondera County Cause No. 8509 are null and void.

Here Bouma has concocted the novel theory that *Selway v. Burns*, 150 Mont. 1, 429 P.2d 640 (1967), a probate case in which a state court vacated one of its pior orders because of misrepresentations made by counsel, would allow this federal court to vacate a state court holding. As we explained in our October 8, 1980, Order denying the temporary restraining order, only exceptional circumstances can justify interference with a state court proceeding. October 8, 1980, Order at p. 3. Furthermore, we are aware of no authority whatsoever empowering a federal court to vacate a state court judgment based on alleged legal errors. Comity and federalism both prevent our intervention in the proceedings of the Montana district court.

We must further point out that most of the Count II defendants are judges or courts who, again, are immune under *Pierson v. Ray*, 386 U.S. 547 (1967). One of the other defendants, receiver Campanella, is also immune as a quasi-judicial officer under *Pierson*. Based on both absence of jurisdiction and immunity, we must also grant the Count II defendants' motions to dismiss.

IV. COUNT III

Count III alleges violations of 42 U.S.C. § 1986 (1976) by federal officials for the refusal to seek a mail fraud indictment against the banks and the bank officials involved in the state court litigation. As discussed above, this civil rights statute provides a

cause of action for damages to anyone who permits a § 1985 violation to occur. Clearly, then, the failure of the Bouma complaint to adequately allege a § 1985 violation also defeats his § 1986 allegations.

Furthermore, the Count II defendants are all federal prosecutors who declined to impanel a federal grand jury to consider Bouma's allegations of mail fraud. As such, these officials are clearly immune from a § 1983 suit under *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976): "The ultimate fairness of the operation of the [criminal justice] system itself could be weakened by subjecting prosecutors to § 1983 liability." For this same reason, we do not believe the prosecuting officials named as defendants here should be subject to suit.

It is true that *Imbler* did not address the issue of whether a prosecutor acting in his role of administrator or investigative officer would be subject to § 1983 liability. *Id.* at 431. However, other cases have held that even prosecutors engaged in the quasi-judicial activity of deciding whether or not to prosecute fall under the *Imbler* immunity. In *Hall v. Flathead County Attorney*, 478 F.Supp. 644 (D. Mont. 1979), Judge Russell Smith held that a prosecutor could not be sued under § 1983 for deciding to prosecute or not to prosecute:

> The problems of what evidence to believe, what evidence to present, what avenues of inquiry to pursue, and what cases to file, lie at the heart of the prosecutorial function, and decisions as to them are the kinds which ought to be the subject matter of second-guessing in a civil rights action.

Id. at 645, *citing Imbler v. Pachtman*, 424 U.S. at 424-25. We find ourselves in agreement with Judge Smith on this point. Thus, we believe all the prosecuting federal officials sued under Count III for their failure to seek federal indictments must be dismissed.

V. COUNT IV

Count IV is similar to Count III except that here the § 1986 violations for failure to prosecute are against county rather than

federal officials. Because no class-based discrimination is alleged, we have seen that Bouma's complaint fails to state a cause of action under either § 1985 or § 1986. Furthermore, because these county officials are acting in a quasi-judicial capacity of deciding whether or not to prosecute, they are immune from either § 1983 or § 1985 liability. And finally, because no due process violations are sufficiently identified, the § 1983 claims must also fail. For all of the above reasons, the motions to dismiss of the Count IV defendants must also be granted.

VI. MOTIONS FOR SUMMARY JUDGMENT

Both defendant McCracken and Bouma have moved for summary judgment in this case. Based on the above discussion granting all of the defendants' motions to dismiss, it is evident that Bouma's motion for summary judgment must be denied. And since we have granted McCracken's motion to dismiss, his motion for summary judgment is now moot and must also be denied. Since any of Mrs. Ralph Bouma's claims are based upon Ralph Bouma's complaint or cause of action, the above Memorandum Opinion applies to her claims as well.

An appropriate order will issue in accordance with this Memorandum Opinion.

Done and dated this 20th day of April, 1981.

ss: James F. Battin
Chief United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 81-3331
D.C. No. CV-80-117-GF
MEMORANDUM[2]

RALPH BOUMA and MRS. RALPH BOUMA, his wife,

Plaintiff/ Appellants.

vs.

LARRY C. IVERSON, INC., a Montana Corporation, et al.,

Defendants/ Respondents.

Appeal from the United States District Court
for the District of Montana
James F. Battin, Chief Judge, Presiding
Submitted June 9, 1982

Before: HOY, TANG and BOOCHEVER, Circuit Judges.

The Boumas appeal the dismissal with prejudice of their civil rights claims under 42 U.S.C. §§ 1983, 1985 and 1986. We affirm.

The Boumas contend the state courts deprived them of due process: (1) by construing the Montana Corporate Code to require nullification of contracts entered into without strict compliance with that code; and (2) by giving collateral estoppel effect to findings of fact and conclusions of law of former judgments to which the Boumas were allegedly strangers. These arguments are without merit. The assertion that a state court decision is incorrect and contrary to prior state court decisions does not present a question for federal review. The district court properly concluded that no fourteenth amendment violations had

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[2] filed by clerk of court June 21, 1982

been presented. *Patterson v. Colorado ex rel. Atty. Gen.*, 205 U.S. 454, 461 (1907).

The district court correctly concluded that the state judges and county prosecutor are immune from the claims brought against them by the Boumas. The district court's citation and discussion of *Imbler v. Pachtman*, 424, U.S. 409, 431, (1976); *Pierson v. Ray*, 386, U.S. 547 (1967); and *Hall v. Flathead County Attorney*, 478 F. Supp. 644 (D. Mont. 1979), amply support its conclusion.

The Boumas correctly argue that on a Fed. R. Civ. P. 12(b) (6) motion to dismiss for failure to state a claim, the complaint is construed in a light most favorable to the plaintiff, and all factual allegations are assumed to be true. But it is well established that mere conclusory allegations without reference to material facts are insufficient to state a claim under the Civil Rights Act. *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980); *see also: United States v. City of Philadelphia*, 644 F.2d 187, 204 (3rd Cir. 1980); and *Cohen v. Illinois Institute of Technology*, 581 F.2d 658, 663 (7th Cir.) *cert. denied*, 439 U.S. 1135 (1979). We have reviewed the record and we agree with the district court that Boumas have stated only conclusory allegations of civil rights violations without reference to material facts. The motion to dismiss was properly granted.

The district court's memorandum opinion adequately disposed of all issues raised and it is hereby affirmed.

AFFIRMED.

AFFIDAVIT OF MAILING AND SERVICE

STATE OF MONTANA,
County of Cascade, } ss.

RAY F. KOBY, being duly sworn, deposes and says:

1. That I am a member of the bar of the Supreme Court of the United States and one of the attorneys of record for the respondent in the within matter.

2. That on April 8, 1983, I personally deposited in the mail at the United States Post Office in Great Falls, Montana, properly addressed, first class postage prepaid, the original and forty copies of Respondent's Brief in Opposition, (with Appendix) to the clerk of the within entitled court, within the time for filing.

3. That at the same time and place I mailed in the same manner three copies of said brief and appendix to Ralph Bouma, P.O. Box 220, Choteau, MT 59422 and three copies to the attorney for Mrs. Ralph Bouma, John Albrecht, P.O. Box 193, Choteau, MT 59422.

ss: RAY F. KOBY

SUBSCRIBED AND SWORN TO before me this 8th day of April, 1983.

GORHAM E. SWANBERG
Notary Public for the
State of Montana
Residing at
Great Falls, Montana
My Commission expires: 8/11/85

(NOTARIAL SEAL)